HO SIM PAT

v.

CHANG AH NGI & ANOR.

HIGH COURT MALAYA, MALACCA
WAN YAHYA J
[ORIGINATING SUMMONS NO. 76/84]
7 JULY 1986

LAND LAW: *Land mortgaged as security for repayment of a loan - Mortgage registered - Whether mortgagee entitled in law to continue occupying the land as mortgagee - Limitation.*

This was an application by the plaintiff for a declaration that the interest on the mortgaged land be extinguished and that the mortgage be discharged or extinguished. The land is a Malay customary land and all dealings in the land were suspended by the British military administration moratorium Proclamation No. 5. The deceased mortgagee and the defendants who are members of the deceased's family have been in occupation of the land as mortgagee in possession since 1942 and they contended that they had neither received payment for the principal or interest of the mortgage debt nor did they acknowledge the plaintiff's title in accordance with the provisions of s. 27 of the Limitation Act 1953.

Held:

[1] The plaintiff's application failed because the right of the defendants as administrators to the mortgagee in possession has not been extinguished and still subsist.

[2] The plaintiff's right to redeem his land has been barred by s. 16 of the Limitation Act.

[Application dismissed with costs.]

Legislation referred to:

Debtor and Creditor (Occupation Period) Ordinance 1948, ss. 11,11(1),(3),(5), (7).
Limitation Act 1953 (Act 254), ss. 9(2), 9, 27
Lands Customary Rights Ordinance (Cap 125) (Malacca) ss. 22, 24, 30
National Land Code (Penang and Malacca Titles) Act 1963, ss. 22, 33, 53, 53(4), 88, 88(1), 96, 99, (1) (b), (2) (c), 102, (2), (3), 103(c)

For the plaintiff/applicant - A.C. Vohrah
For the defendants/respondents - Lee Kong Fee

JUDGMENT

Wan Yahya J:

During the Japanese occupation of Malaya and precisely on 21 September 1943, Ho Sim Pat, the plaintiff herewith mortgaged his land EMR 347, Balai Panjang (now known as Lot Nos. 648 and 650) Malacca to Chang Syoh Ku, as security for repayment on 2 September 1943 of a loan of RM1,500 (occupation currency) at 14% p.a. interest. The mortgage was duly registered. Ever since 1942 Chang Syoh Ku (mortgagee) and his family had been in occupation of the land and until this date neither the repayment nor the interests have ever been made by the plaintiff. The present defendants are the administrators of the estate of the mortgagee who died in 1971.

The plaintiff by this originating summons now claims for a declaration that the estate or interest of the mortgaged land be extinguished and that the mortgage be discharged or extinguished. His Counsel argues that the defendants should have taken steps to recover the debt immediately after the moratorium period i.e. 29 August 1945 to 30 September 1949 as provided in the British Military Administration Moratorium Proclamation No.5 dated 29 August 1945 and the Moratorium Proclamation (Repeal) Ordinance 1949. According to Counsel on 1 Ocotber 1949 the mortgagee could have availed himself of the remedies under ss. 11(3), 11(5) and 11(7) of the Debtor and Creditor (Occupation Period) Ordinance 1948, and as the defendants had not done so within 18 months as stipulated under s. 11(5), his remedies had been extinguished. However, Counsel conceded that as the land is a Malay customary land and the Collector had made an endorsement, the mortgagee might have further remedies.

Counsel next contends that as the endorsement had been made under Part VIII of the National Land Code (Penang and Malacca Titles) Act 1963, the mortgagee should have made an application under s. 53 of the said Act and as no application was made under this Section within the 16 years period as stipulated in s. 88(1) as extended by MPU 8/78, the plaintiff's title had become indefeasible; and by reason of s. 99 of the Act, the plaintiff had had acquired a transferable right which have the effect of ousting the Mortgagee from the land. This appears to be erroneous contention as the mortgage was in fact registered under s. 22 of the Malacca Lands Customary Rights Ordinance and not under the Act.

It may be helpful at this stage to examine generally the process of dealings in the land from 21 September 1942. The land was lawfully mortgaged on that date and the mortgagee went into occupation. On 21 September 1943, when repayment was due and no payment towards the principal or interest made, the mortgage subsists until 6 September 1945 when the occupation period ended with the Japanese surrender. From that date until 30 September 1949 all dealings in land were suspended by the British Military Administration Moratorium Proclamation No. 5. On 1 October 1949 after the repeal of this moratorium period vide Ordinance 37/49, the mortgagee could have issued notice under s. 24 of the Malacca Lands Customary Rights Ordinance (Cap. 125) and applied for the land to be sold. The mortgagee did not elect to do so but continued to occupy the land. He was perfectly entitled to do so as there was nothing in the Malacca Lands Customary Rights Ordinance or in other law which prevented him from continuing to occupy the land as a mortgagee in possession. Indeed s. 30 of the Ordinance made it clear that:

> The registration of a mutation upon genuine transfer or transmission by the registered holder of customary land or of a mortgage shall be taken in all Courts as conclusive evidence that the person named therein as registered holder or mortgagee thereof is absolutely and indefeasibly entitled to be registered as holder thereof, or as mortgagee thereof as the case may be. The title of such holder or mortgagee shall not be subject to be questioned except on the ground of fraud or misrepresentation to which he is proved to be a party, or on the ground of adverse possession.

Plaintiff's Counsel has stated that the mortgagee's right as a mortgagor had been extinguished by the Debtor and Creditor (Occupation Period) Ordinance 1948, because he did not take the action spelt out in s. 11 of the Ordinance within 18 months from the commencement of the Ordinance.

I am unable to accede to his views. For the purposes of this argument only, part of s. 11(1), 11(3) and 11(5) are reproduced below:

(1) In any case where **a debt purporting to have been discharged in whole or in part by payment in occupation currency,** is, by virtue of the provisions of this Ordinance, deemed to be partly undischarged, **and where the payment of such debt** before it purported to be discharged as aforesaid **was secured by a charge over property** movable or immovable and such charge has, or purports to have, been discharged by the chargee or by his agent or by the Custodian or a liquidation officer, such discharge shall (subject to the proviso next following) be void as against the chargor or his personal representatives and any person claiming through or under him or them, and the charged property shall stand charged with the revalued balance of the debt and interest, if any, accrued and unpaid and to accrue thereon:

Provided that-

(a) where the charged property is movable property and such property has, after its discharge or purported discharge as aforesaid, been transferred or charged to a *bona fide* purchaser or chargee for value; or

(b) where the charged property is immovable property and such property has, after its discharge or purported discharge as aforesaid, been transferred or charged to a *bona fide* purchaser or chargee for value without the intervention in the transaction of the **Custodian** or a liquidation officer;

the discharge to the chargor by the chargee or his agent shall not be void as aforesaid, but the title of such *bona fide* purchaser or chargee for value, or any person claiming through or under him shall prevail against the title of the original chargee.

(3) **Where the rights of a creditor** in relation to any charge **have been deemed, by virtue of subsection (1) of this section, not to have been extinguished,** the creditor may give notice in writing of not less than one month calling upon the debtor and any third party who furnished the security to reinstate or replace such charge and to execute all documents and do all acts necessary for that purpose.

(5) In any case where-

(a) the debtor or a third party who furnish the security makes **default in complying with a notice given by a creditor** under sub-section (3) of this section; or

(b) the rights of any person appearing from the Register to be a purchaser or **chargee** who purchased or **advanced money on or after the date of the purported discharge,** will be affected by the reinstatement of a security; or

(c) any difference or **dispute** has arisen **touching** the reinstatement of any **security** under this section;

the creditor or the debtor or any person interested may within eighteen months from the commencement of this Ordinance apply to the High Court by way of originating motion or summons for such relief as the nature of the case requires; and the Court may determine any claim by any person to be a *bona fide* purchaser or chargee for value within the proviso to sub-section (1) of this section and may make an order that the security shall not be reinstated or may make an order for the reinstatement of the security or its replacement with other security for such amount as may be specified in the order, or may make such further or other order as to the Court shall seem fit, and may direct that the Register shall be rectified accordingly.

(Emphasis is mine)

Sub-section (1) of s. 11 as I read it, applied only in specific cases where a debt has been wholly or partly discharged in occupation currency and where the payment of that debt was secured by a charge over property which has been discharged. In the case before us, no payment was made at all in whatever currency and therefore there was no question of discharge having not been applied for or made.

Similarly, sub-section (3) has no application in our present case as it is also enacted with reference to rights of a creditor deemed to have been extinguished by virtue of sub-section (1). In sub-section (5), the 18 months period, applies only in the case where (a), there has been a default by a debtor to a notice given by the creditor, (b) the rights of purchaser or chargee who purchased or advanced money on or after the purported discharge and (c) in case of difference or dispute on the reinstatement of the security. In our present case, no notice had ever been issued and the mortgagee was not a chargee who advanced money after purported discharge; and no dispute had yet arisen between them on security. As the 18 months relate only to the circumstance mentioned in (a), (b) and (c) above, it has no application at all to our present case.

In my view, with the exception of the specific and isolated provision of s. 11(5) as discussed earlier, the Debtor and Creditor (Occupation Period) Ordinance 1948 is not enacted with the object of placing a time period within which all rights and claims made during the occupation period must be claimed. On the contrary, this law was intended to provide a mode of valuation in Malaysian currency in respect of unsatisfied occupation debts incurred in the occupation currency. If this is not the case, then the Ordinance should have been revoked after 18 months of its enactment. The Malacca Lands Customary Rights Ordinance is repealed by s. 96 of the National Land Code (Penang and Malacca Titles) Act 1963. As a result of this, the holders of customary land shall cease to hold their customary lands in accordance with the repealed ordinance but shall continue to do so subject to and in accordance with Part VIII of the Act of the National Land Code.

Section 102 then went on to outline the procedures to be followed in transforming the former EMR land into Malacca Customary Land Register as follows:

> (1) **Subject to this section,** the Mukim Register kept under the Ordinance shall continue in existence after the appointed day, but shall be known as the Malacca Customary Land Register.
> [Emphasis is mine]
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> (2) As and when it is expedient to do so, the Collector shall prepare and issue documents of title, under the National Land Code in continuation of the titles entered in the Malacca Customary Land Register and, in doing so, shall follow as nearly as may be the procedure prescribed by the National land Code in respect of land held on a Mukim grant for the issue of final title in continuation of final title to land as a whole:
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> Provided that-
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> (a) sections 166 to 169 of the Code shall not apply; and
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> (b) no fee shall be chargeable.

In my opinion, Sub-section (1) is not intended to operate as an automatic transfer of land registered under the mukim register into the Malacca customary land register immediately on the appointed day. The phrase 'subject to this section' is intended to clarify that the holdings in the mukim register will be eventually placed on the Malacca customary land register when other provisions of s. 102, particularly sub-section (2) thereof have been complied with. Until then a EMR holding will be continued to be referred to as such until the Collector has had the opportunity to prepare and issue a replacement title in the Malacca customary land register. Indeed we have just been told by the Collector that this is the practice in the Land Office and that some holdings have been issued with Malacca customary land register titles whilst a remaining of 6,000 or so are still awaiting the processing under sub-section (2) of s. 102. This intention of the legislature is also elucidated in s. 99(2)(c) in which it is provided

that in the application of the National Land Code to Customary Land, the Malacca Customary Land Right (MCLR) shall be deemed to be a mukim register.

It is obvious from the above as well as the Collector's evidence, the land in the present case, is a customary holding registered under the Mukim Register. Until such time as the Collector deem it expedient to process it, the holding will remain as EMR land. In the meantime, all dealings with EMR land can be registered in accordance with sub-section (3) of s. 102 and such registration shall be as effective as a registration under the National Land Code.

Pausing here for a moment, I shall now deal with plaintiff's Counsel's contention of s. 53 of the Act. According to him, within 16 years after the appointed date (Section 88(2) as extended by MPU 8/78) the Mortgagee had to make his claim pursuant to s. 53. Failure to do so will lead to the extinguishment of any of his pre-existing rights over the land. Thereafter the land will become indevisable. I am unable to agree with learned Counsel on this point for two reasons. Firstly s. 24 of the Act expressly excluded the application of s. 88, which is under Part VII of the Act, in the following terms:

> No land or holding which immediately before the appointed day was subject to the provisions of the Malacca Lands Customary Rights Ordinance or to any title by entry in the Mukim Register kept under s. 15 of that Ordinance, to any mutation in title to such customary rights, shall be entered in the Interim Register, and no provisions of this Act, other than the provisions of this section and of Parts I, II, VIII, IX and X, shall apply to any such land or holding.

It is clearly noticeable from the above that a land subject to the former Malacca Lands Customary Rights Ordinance and entered in the mukim register, like our present land, cannot be entered into the Interim Register and will be subjected to the provisions of Parts I, II, VIII, IX and X only. As stated above, s. 88 comes under Part VII, the provisions of which are not intended to apply to customary land.

Secondly, as regards Counsel's argument on s. 53, I am of the view that the *ad hoc* amendments in s. 53(4) can only arise when there is a dispute as to the proprietorship. As the time limit laid down under s. 88 will not apply on customary land, it is open to the mortgagee, before the issuant of his title in continuation and its subsequent registration in the Malacca customary land register, to present him claim of pre-existing interest to the Commissioner under s. 53.

Now, reverting to the position of the land, once again, on the appointed day the land as mentioned earlier, remained as a customary land under the mukim register but then what is the position of the mortgage registered by the mortgagee in 1942? The situation can be ascertained by reference, firstly to s. 24 (*Supra*) which states *inter alia* that Part VIII and not Part VII is applicable to customary land. This point is again repeated in s. 99(1)(b) which specifies that on or after the appointed day the customary land shall be held in accordance with "this Part" i.e., Part VIII of the Act. Now Part VIII itself contain a specific saving provision for pre-existing mortgages which reads:

> Upon the appointed day every pre-existing charge by way of legal mortgage of any customary land, duly registered under the provisions of the Ordinance shall be **deemed** to be a charge duly registered under the provisions of the National Land Code:
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> Provided that-
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> (a) subject to the provisions of para. (b), every such charge shall continue to be subject to all the express and implied conditions thereof subsisting immediately before the appointed day;

(b) notwithstanding any express or implied condition referred to in para. (a), the provisions of the National Land Code shall apply to the discharge of any such charge and in relation to any remedies of the chargee thereunder;

(c) notwithstanding the provisions of the National Land Code, it shall be an implied condition of any charge deemed to be registered under the provisions of this section that no chargee or other person shall have any right to enter into possession thereunder if he is not competent to hold such land under the provisions of this Part.

By virtue of the above, the mortgage registered by the mortgagee in 1942 is **deemed** [emphasis is mine] to be duly registered charge under the National Land Code.

It would appear under s. 103(c) that the defendants may not now be a competent person to hold the land and therefore cannot occupy it as a chargee in possession but that provision will not extinguish his presumed rights or remedies as a chargee under the National Land Code. Alternatively as a customary land will not become indefeasible until the name of its proprietor has been entered on the Malacca customary land register in accordance with s. 102(2) or pursuant to a decision made by the land titles appeal board or the Court, (see proviso to s. 99) the defendants as administrators of the mortgagee's estate are still within their rights to present their claim under s. 33.

Another point of law raised in objection against this application is based on the limitation of redemption action on the plaintiff for failure to redeem the land within 12 years period (as specified in s. 16 of the Limitation Act) from the mortgagee who was, at all times, a mortgagee in possession. The plaintiff's Counsel's argument against this is s. 16 of the Limitation Act 1953 (Act 254) will not apply to this land as it fell under the exemption spelt out in sub-section (2) of s. 9 of the same Act. Now ss. 9 and 16 read as follows:

9. (1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

(2) Nothing in this section or in s. 11(2) of this Act shall be deemed to affect the provisions of the Government Proceedings Ordinance 1956, or the National Land Code (Penang and Malacca Titles) Act 1963, or to apply-

(a) to the Ruler of any State, in respect of State land or land reserved for a public purpose situate in such State; or

(b) to any person registered under or by virtue of the provisions of the National Land Code 1965, or the National Land Code (Penang and Malacca Titles) Act 1963, as the proprietor of the land sought to be recovered, or to any person claiming through a person so registered, except to the extent that such Code or Act so provides or permits.

16. When a mortgagee of land has been in possession of any of the mortgaged land for a period of twelve years, no action to redeem the land of which the mortgagee has been so in possession shall thereafter be brought by the mortgagor or any person claiming through him:

Provided that where a mortgagee is by virtue of the mortgage in possession of any mortgaged land and either receives any sum in respect of the principal or interest of the mortgage debt or acknowledges in accordance with the provisions of s. 27 of this Act the title of the mortgagor, or his equity of redemption, an action to redeem the land in his possession may be brought at any time before the expiration of twelve years from the date of the payment or acknowledgement.

My understanding of s. 9(2) is that, limitation period will not apply to the National Land Code (Penang and Malacca Titles) Act 1963 or to a proprietor registered under the same Act. The right claimed by the defendants is not based on the Act but on a mortgage registered under the Malacca Lands Customary Rights Ordinance (Cap. 125) and similarly with reference to sub-section 2(b), neither is the plaintiff herein a person registered as a proprietor of the land by virtue of the Act or the National Land Code. As indicated earlier, this land as well as other 6,000 still remain as EMR land until such time as the Collector has had the opportunity of processing it under s. 102(2) of the Act.

On the other hand, s. 16 makes express mention of 'mortgage', 'mortgagee', and 'mortgagor' and not 'charge' 'chargee' or 'chargor' as used in the Act and the Code. This I think reflects the clear intention of the legislature to make s. 16 of the Limitation Act inapplicable to pre-existing interest of a mortgagee in possession.

It is noticeable in the record that the deceased mortgagee and the defendants who are members of the deceased's family have been in occupation of the land as mortgagee in possession since 1942 and that they had neither received payment for the principal or interests of the mortgage debt nor did they acknowledge the plaintiff's title in accordance with s. 27 of the Limitation Act.

The application by the plaintiff failed because firstly the right of the defendants as administrators to the mortgagee in possession has not been extinguished and still subsist, and secondly, because the plaintiff's right to redeem his land has been barred by s. 16 of the Limitation Act.

This application is dismissed with costs.

Also found at [1987] 2 CLJ 162